No. 84-1578

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IN THE

Supreme Court of the United States

October Term, 1984

ISABEL MOREL de LETELIER, *et al.*,

Petitioners,

against

THE REPUBLIC OF CHILE, also doing business as LINEA AEREA NACIONAL-CHILE,

Respondent,

and

LINEA AEREA NACIONAL-CHILE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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Respondent LAN-Chile Airlines ("LAN") respectfully prays that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit (the "Petition") be denied.

Citations to Opinions and Judgments Below

Judgment Creditors-Petitioners ("Judgment Creditors") seek review of *Letelier* v. *Republic of Chile*, 748 F.2d 790 (2d Cir. 1984) (Cardamone, J.), *rev'g*, 575 F. Supp. 1217 ((S.D.N.Y. 1983) and 567 F. Supp. 1490 (S.D.N.Y. 1983) (Lasker, J.). Related opinions are reported as *Letelier* v. *Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980) ("*Letelier I*") and *De Letelier* v. *Republic of Chile*, 502 F. Supp. 259 (D.D.C. 1980) ("*Letelier II*") (Joyce Hens Green, J.). A copy of *Letelier II* is reproduced in the Appendix for the Court's convenience.

Statement of the Case

This case involves an attempt to levy on the assets of LAN, a legally-separate state enterprise, to satisfy a default judgment entered against its sovereign, the Republic of Chile (the "Republic"). The default judgment (*Letelier II*) was entered in an action (the "Letelier Action") to which LAN was not party, to which none of its officers or employees was party, and in which the lengthy Complaint made no mention of LAN or any of its officers or employees. *See* First Amended Complaint, Aug. 23, 1978, *Letelier I*, JA 414-20 (the "Complaint").[1] That Complaint sought to impose liability on the named defendants for what was al-

[1] "JA" refers to the parties' Joint Appendix below, and "SJA" to their Supplemental Joint Appendix.

leged to have been a political assassination ordered by a foreign government to silence an opponent of the regime. The Complaint alleged that the assassination was carried out as a mission of state by that government's intelligence service, under the control and direction of military officers who were also named as defendants, by means of a car-bombing in Washington, D.C. *Id.; see also Letelier I* and *Letelier II*.

The Republic did not appear in the Letelier Action. It did communicate at the diplomatic level with the United States Government. These communications denied the allegations, protested the illegality of subjecting a foreign sovereign to compulsory jurisdiction in the national courts of another state as to such allegations, and offered international adjudication. SJA 10-45.

Two and one-half years after the default judgment was entered in *Letelier II*, Judgment Creditors registered the judgment in the United States District Court for the Southern District of New York and instituted there the supplementary proceeding below seeking to enforce the judgment against the assets of LAN.[2] LAN appeared through its

[2] Judgment Creditors did not contest LAN's status at all relevant times below (prior to a reorganization planned for 1984-85 as a result of substantial operating losses; *see* JA 1028, 550-53, 1241-43 and 1248) as the holder since 1958 of a foreign air carrier permit approved by the President of the United States, or as a legally-separate commercial enterprise of the Chilean state, wholly-owned by the Chilean Government, and maintaining its own books and records, distributing its own financial statements, having its own employees, assets, and creditors (including significant private bank creditors), possessing capacity to sue and be sued and in fact having sued the Republic and been sued by the Republic, and liable to the Republic for income taxes, stamp taxes, value-added taxes and customs duties in the same manner as any private company. JA 558-646, 651-736 and 951.

own counsel, contested the allegations as to it, and sought to defend its assets. The Republic did not appear, but did send another diplomatic note. SJA 1-9.

The supplementary proceeding was, in relevant part, founded on two theories: (1) Judgment Creditors' claim against the Republic in the Letelier Action was "based upon commercial activity" of the non-party LAN, and therefore LAN's assets had no immunity from execution under § 1609 of the Foreign Sovereign Immunities Act of 1976 (the "FSIA"), 28 U.S.C. § 1609, and (2) LAN's assets should be used to pay the judgment against the Republic in *Letelier II* because the Republic had supposedly involved LAN in the murders which were the subject of that action and by so doing had allegedly ignored LAN's separate existence.[3]

The District Court for the Southern District of New York accepted the Judgment Creditors' theories. *De Letelier* v. *Republic of Chile*, 567 F. Supp. 1490. While holding that the evidence was "inadequate" to justify taking LAN's assets to pay the Republic's judgment debt (*id.* at 1497), the District Court went on to make findings as to LAN's involvement in the murders at the behest of the Republic's intelligence service on the basis of Rule 37 sanctions imposed for the Republic's failure to give discovery

[3] *See* Judgment Creditors' Memorandum of Law, Mar. 18, 1983, *passim*, *De Letelier* v. *Republic of Chile*, 567 F. Supp. 1490 (S.D.N.Y. 1983). Judgment Creditors argued to the District Court that LAN "participated directly in the murders," that LAN's personnel "cooperated willingly in what they knew to be an illicit scheme" of the Chilean intelligence service, and that "the LAN-Chile entity" should therefore be held "responsible." *Id.* at 13, 23 and 25; Judgment Creditors Reply Brief, May 6, 1983, at 4 and 27, *De Letelier* v. *Republic of Chile*, *supra*.

as to the activities of its intelligence service in connection with the murders. *De Letelier* v. *Republic of Chile,* 575 F. Supp. 1217. LAN was not found to be in default on any discovery.

The Court of Appeals unanimously reversed the District Court on three separate points, holding that: (i) the claim of Judgment Creditors underlying the Letelier Action was not a claim based upon commercial activity within the meaning of § 1610(a)(2) of the FSIA, (ii) neither the allegations of joint participation in a tort nor the evidence submitted by Judgment Creditors supported the claim of an abuse of corporate form that would justify requiring LAN in a post-judgment supplementary proceeding to pay the Republic's judgment debt through disregard of LAN's separate existence under the principles of *First National City Bank* v. *Banco para el Comercio Exterior de Cuba,* 462 U.S. 611 (1983) ("*Bancec*"), and (iii) it was error for the District Court to sanction LAN for the Republic's failure to give discovery and to use those sanctions to hold LAN responsible for the Republic's judgment debt.

Judgment Creditors now seek a writ of certiorari to the Court of Appeals with respect to this decision.

Summary of Argument

1. The Petition's First Question presented, whether a judgment entered under § 1605(a)(5) of the FSIA may ever be executed under § 1610(a)(2), was not actually decided by the Court of Appeals and is not properly presented to this Court on this record. Even if the Second Circuit had decided that a § 1605(a)(5) noncommercial tort judg-

ment can never be executed upon under the "commercial activity" exception to execution immunity of § 1610(a)(2), however, that decision would have been correct. Finally, amendments to the FSIA introduced in the United States Senate on May 3, 1985 address the very issue which Judgment Creditors ask this Court to review. Thus, the Petition's First Question Presented is not properly presented by this record, to the extent that the issue exists it may soon be mooted by new legislation, and any review by this Court would necessarily be an advisory opinion. *See infra* pp. 8-12.

2. The Petition's Second Question Presented does not accurately reflect either the holding or the rationale of the Court of Appeals on the issue of execution immunity. The Court of Appeals held that the claim of Judgment Creditors for alleged tortious participation in a political assassination was not a claim based upon "commercial activity." This holding was not based on the broad theory which Judgment Creditors ask this Court to review, but on the facts of this case, specific legislative history of the FSIA, and a long line of decisions under the FSIA in various Circuits showing that the "commercial activity" exception in the FSIA is not to be applied to acts which are by their nature governmental even though they may have incidental or implementing commercial aspects. There is therefore no reason for this Court to review the decision below on the Petition's Second Question. *See infra* pp. 13-16.

3. The Petition's Third Question Presented seeks review of the Second Circuit's application of this Court's recent decision in *Bancec*, 462 U.S. 611. To reach this issue, this Court would first have to reverse the Court below on

the FSIA issues. Also, both the District Court and the Court of Appeals below found the evidentiary record to be inadequate to prove the allegations which Judgment Creditors state as fact in the Petition. Thus, to consider the *Bancec* issues, this Court will either have to reverse the Court below on that finding or reinstate the District Court's use of Rule 37 sanctions imposed upon LAN due to the Republic's failure to respond to discovery. Moreover, the decision below does not present new and important issues of corporate disregard in relation to state enterprises. Such issues were elucidated only two terms ago in *Bancec*. The Court of Appeals merely applied *Bancec*, and its application was both narrow and correct. *See infra* pp. 17-19.

4. The Petition's Fourth Question asks this Court to review the Second Circuit's holding that the District Court erred in using Rule 37 sanctions to draw adverse evidentiary inferences against LAN because of the Republic's failure to respond to discovery. Contrary to Judgment Creditors' assertions, the Court of Appeals' decision conflicts neither with the Second Circuit's nor other Circuits' prior decisions. The Court of Appeals was correct in its application of the plain language of Rule 37 and of requirements established by this Court that Rule 37 sanctions be just and adhere to due process. In addition, this case does not present a good opportunity for defining the circumstances in which discovery sanctions may be applied against foreign states, given the nature of the discovery requested in the District Court (inquiries as to the organization and activities of a foreign sovereign's secret service), and the lack of decisions in lower court's exploring when a foreign state's failure to give discovery may justify sanctions under the FSIA and international law. *See infra* pp. 20-23.

Argument

The Petition takes a certain view of what the evidence in the case shows, both in the statement of Questions Presented and in the Argument.[4] Although it may not emerge clearly from the Petition, this view was not shared by either Court below. The District Court found the evidence "inadequate" and resorted to sanctions instead. 567 F. Supp. at 1497. The Court of Appeals overturned the sanctions and, after extensive briefing and oral argument on the evidentiary issues, found that the evidence, insofar as it bore on the point, contradicted rather than supported Judgment Creditors' repeated assertions that the Republic used its power as sole owner of LAN to involve LAN in a scheme to commit a political murder, or that the Republic abused LAN's corporate form.[5] *See* 748 F.2d at 794-95.

The reasons the Petition should be denied are not, however, restricted to its many departures from the evidentiary

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[4] *See, e.g.,* Petition at (i) (". . . state-owned commercial operation which the state used to cause injury"), 3 ("The judgment is based upon a wrongful scheme in which the Chilean state . . . used its power as sole owner of the Chilean state airline to induce airline personnel to lend commercial assistance to a government mission . . . in 1976."), 4 ("While Chile had co-opted the commercial activities of its airline in furtherance of the scheme. . . ."), 16 ("airline activity was an essential causal link in the harm which occurred"), and 25 ("abusive acts whereby Chile had recruited its airline's involvement in the wrongful scheme").

[5] The evidence consisted primarily of the recorded testimony of Michael Vernon Townley in a prior criminal trial and of some government reports that derived principally from that testimony. JA 77-147 and 447-547. Townley testified as a cooperating government witness that he had flown between the United States and Chile as a passenger on LAN, that he had on occasion sent small packages with friendly crew members of LAN without their knowing the contents or the nature of his business, and that he had discussed the assassination in an airport lounge with a Chilean intelligence agent who was returning to Chile as a passenger of LAN. *Id.* at 77-147.

record.[6] An examination of the decision in the Court of Appeals also shows that neither the holdings nor the rationale of that Court is reflected in the Questions Presented, and that the actual holdings do not raise questions appropriate for review in this Court through grant of a writ of certiorari.

I.

There Are No Grounds for Granting Certiorari on the Petition's FSIA Issues

A. The Petition's First Question Was Not the Subject of a Holding by the Court of Appeals

The Petition's First Question raises the issue of whether the "commercial activity" exception to execution immunity under § 1610(a)(2) of the FSIA may ever be available to satisfy a judgment on a noncommercial tort under § 1605 (a)(5) of that act. The Court of Appeals did not decide this question. It held that Judgment Creditors' claim was not in fact based upon "commercial activity."[7]

The Second Circuit merely observed that the statutory language "suggests that the commercial activity exception to *jurisdictional immunity* . . . and the tort exception . . .

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[6] Thus, the Petition blandly asserts that the appeal to the Court of Appeals was taken by "the Chilean authorities," and that "the Chilean authorities" also posted a supersedeas bond. It is, of course, a matter of record that the appeal was taken by LAN (JA 1287-88) in defense of its own assets, and that the bond was posted by LAN (JA 1290-92).

[7] Judgment Creditors concede that to reach the "mutual exclusivity" issue requires holding that § 1610(a)(2) of the FSIA is a "basis [for execution] that would otherwise be available." Petition at 10.

are mutually exclusive." 748 F.2d at 795 (emphasis added). Rather than base its holding on this observation, however, it then reviewed the history of the FSIA in general and the "commercial activity" exception to both jurisdiction and execution immunity in particular and held that the activity upon which Judgment Creditors' claim was based was not by its nature "commercial activity":

> Carriage of passengers and packages is an activity in which a private person could engage. It is not for those activities that LAN's assets are being executed against. Rather, plaintiffs assert that LAN itself participated in the assassination and essentially accuse LAN of being a co-conspirator or joint tortfeasor. In other words, LAN is accused of engaging in state-sponsored terrorism the purpose of which, irrelevant under the FSIA, was to assassinate an opponent of the Chilean government. Politically motivated assassinations are not traditionally the function of private individuals. They can scarcely be considered commercial activity. Viewed in this light, LAN's participation, if any, in the assassination is not commercial activity that falls within the § 1610(a)(2) exception and its assets therefore are not stripped of immunity.

Id. at 797-98.[8] Finally, the Second Circuit reviewed the District Court's "right without a remedy" rationale and concluded that, in light of the FSIA's history and the status of current international sovereign immunity practice, the lower court's rationale was untenable. *Id.* at 798-99.

Thus, whether §§ 1605(a)(5) and 1610(a)(2) are mutually exclusive was not decided below. Hence, the "technical traps" Judgment Creditors claim were laid by the

[8] *See also id.* at 799 ("An act of political terrorism is not the kind of commercial activity that Congress contemplated.").

Second Circuit's decision simply do not exist, and there is no need for this Court to decide this issue in what would be, perforce, an advisory decision.[9]

B. Even if the Court of Appeals Did Decide the Petition's First Question, that Decision Was Correct

Assuming, *arguendo,* that the Second Circuit had found §§ 1605(a)(5) and 1610(a)(2) to be mutually exclusive, that decision would be correct. The FSIA's language, purpose and legislative history make clear that § 1610(a)(2) is not available as a means of executing upon a noncommercial tort judgment rendered under § 1605(a)(5).

The first phrase of § 1605(a)(5) states that the section applies to claims "not otherwise encompassed in" the commercial activity exception to jurisdiction immunity, 28 U.S.C. § 1605(a)(2). The legislative history confirms this by stating that § 1605(a)(5) applies to "noncommercial torts." H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 20-21, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604, 6619-20 ("House FSIA Report"). A comparison of the structure of § 1605(a) and § 1610(a) shows that the execution immunity exceptions track the jurisdiction immunity exceptions. The legislative history also specifically notes the connection between § 1610(a)(5) and § 1605(a)(5). *Id.* at 29. It also notes that the "commercial activity" exception

[9] Because the Court of Appeals did not reach the "mutual exclusivity" issue, it did not have to consider whether the doctrine of claim preclusion barred Judgment Creditors from asserting claims in a post-judgment proceeding of the existence of a broad "scheme" (Petition at 3) by the judgment debtor to commit the tort for which judgment had already been entered.

to execution immunity in § 1610(a)(2) includes "commercial activity" giving rise to a claim where there has been a waiver of jurisdictional immunity (§ 1605(a)(1)) or giving rise to a maritime lien (§ 1605(b)). *Id.* at 28. The legislative history does not state that a similar result may be obtained when jurisdiction is based on § 1605(a)(5)—a section which, unlike other paragraphs in § 1605(a), explicitly excludes claims based on commercial activity. Finally, § 1610(b)(2) shows that Congress carefully considered the executability of noncommercial tort judgments, and decided to make them executable when the judgment was against a commercial instrumentality as opposed to the state itself where, in the absence of a waiver, execution is restricted to insurance proceeds. *See* 28 U.S.C. § 1610(a)(5).

In short, Congress clearly intended that § 1610(a)(2) not be available to execute on a § 1605(a)(5) judgment. Thus, to the extent that the Court below so held, it was correct.

C. Certiorari Is Not Appropriate Because the Petition's First Question Will Be Mooted by Proposed Amendments to the FSIA

The Petition's First Question will be mooted by proposed amendments to the FSIA which have been drafted by the American Bar Association and were introduced in Congress on May 3, 1985 (the "ABA Amendments"). S. 1071, 99th Cong., 1st Sess., 131 Cong. Rec. S5363 (May 3, 1985); *see generally* Newman and Burrows, *Proposed Amendments Foreign Sovereign Immunities Act of 1976,* N.Y.L.J., Mar. 22, 1985, at 1, col. 1. If adopted, the ABA Amendments will change § 1610 of the FSIA to: (1) provide that U.S. commercial assets of a foreign state may be

executed upon to satisfy any type of judgment against the state, including a noncommercial tort judgment, and (2) remove the requirement that commercial assets, to be executed against, must have been used in the commercial activity upon which the claim is based.

There is no need for this Court to review an issue of statutory construction in the face of amendments on that very issue which have been proposed and approved by the American Bar Association and will be acted upon by Congress.

D. The Actual Holding of the Court of Appeals on Execution Immunity Does Not Present the Petition's Second Question and Does Not Raise an Important Question Appropriate for Review by This Court

In its Second Question, the Petition attributes to the Court of Appeals the position that "intrinsically commercial activities of a foreign state lose their commercial nature and assume a privileged status of immunity" if combined with noncommercial activity or entered into with the purpose of political terrorism. Petition at (i). In their Argument, Judgment Creditors describe in similar terms "[t]he Second Circuit's theory that an admixture of political activity or 'terrorist' purpose in otherwise commercial activity makes the entire combination 'noncommercial' . . . ." *Id.* at 10-11.

The Court of Appeals' actual holding on the issue of sovereign immunity from execution was that Judgment Creditors' claim was not based upon "commercial activity," within the meaning of § 1610(a)(2), and therefore could not be executed upon under that provision. This holding appears to have been based, not on the "theory"

which Judgment Creditors ask this Court to review, but rather on the facts of this case and the statute's language and legislative history. *See* 748 F.2d at 796-97.

These facts include a Complaint that shows no commercial aspects of the conduct complained of and no commercial defendant. They also include a default judgment in which the trial court accepted the Complaint's allegations as to a political assassination organized by a foreign intelligence service as a mission of state. No commercial activity, either by the defaulting Republic or by the non-party LAN, was an element in either cause of action on which default judgment was entered against the Republic.[10]

The legislative history on which the Court of Appeals relied included specific statements of Congressional intent that governmental programs not be deemed to be commercial activity merely because they were implemented in part by commercial transactions. 748 F.2d at 796-97, *citing*, House FSIA Report at 16. The decision by the Court of Appeals applied this guidance to a specific case, and held that the claim in the Letelier Action for a political assassination allegedly carried out by an intelligence service as a mission of state was not a claim based on commercial activity. This

[10] The District Court's opinion in *Letelier II* did include an apparent reference to Townley's testimony that he made use of facilities and personnel of LAN in the course of his own activities. The opinion also described Townley's use of the commercial services of a number of other entities (e.g., another airline, a department store, an electronics store, a hotel, *etc.*). As the Court observed in reference to LAN, it would appear that all these various entities were entities whose "facilities and personnel . . . were used by Townley in connection with the preparation and carrying out of the assassination." *Letelier II*, 502 F. Supp. at 262, App. at 8a. Clearly, the "claim" of Judgment Creditors against the Republic in *Letelier II* was not "based upon" the commercial activities of the entities providing these services.

narrow decision does not present a broad or important question of law appropriate for review by grant of a writ of certiorari.

E. The Court of Appeals Correctly Decided, in Harmony with Decisions from Other Circuits, that Judgment Creditors' Claim Was Not Based Upon "Commercial Activity" Within the Meaning of § 1610(a)(2) of the FSIA

The Court of Appeals recognized that the basis on which execution was sought against LAN's assets was at bottom the allegation that LAN was a co-conspirator or joint tortfeasor in the alleged political assassination for which judgment had been entered against the Chilean government. 748 F.2d at 794. The Court's conclusion that a government-ordered assassination of a political opponent is not "commercial activity" within § 1610(a)(2) of the FSIA is fully in keeping with the FSIA's language, Congress' intent in passing the Act, and decisions from other Circuits.

The purpose of the FSIA's commercial activity exception to sovereign immunity is to protect those who have dealings with foreign states in commercial matters. *See* House FSIA Report at 6-8; *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 487-89 (1983); *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 703-04 (1976) (plurality opinion). To this end, whether a particular activity is "commercial activity" is "determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d). "[I]t is the essentially commercial nature of an activity or transaction that is critical." House FSIA Report at 16.

Congress specifically considered the subject of commercial transactions in implementation of governmental programs. The legislative history expresses Congress's intent that commercial transactions not lose their commercial character merely because entered into as part of a governmental program, and that the governmental participation in the program not be deemed "commercial" merely because commercial transactions are carried out to implement the program. *Id.* (AID programs remain governmental, not commercial, even though implemented through commercial transactions, and hiring military, civil service or diplomatic personnel is activity whose "essential nature" is governmental, not commercial). In this connection, the Court below noted that "not every act of a foreign state that could be done by a private citizen in the United States is 'commercial activity' . . ." 748 F.2d at 797, *citing, In re Sedco, Inc.*, 543 F. Supp. 561, 565 (S.D. Tex. 1982).

There have been many decisions under the FSIA in which courts have carried out Congress's intent and have declined to apply the commercial activity exception where a state commercial entity was extending intragovernmental cooperation to another state entity carrying out a sovereign function, or where a state noncommercial entity was engaging in governmental activity with an incidental commercial aspect.[11]

[11] *E.g., Arango* v. *Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1378-79 (5th Cir. 1980); *Yessenin-Volpin* v. *Novosti Press Agency*, 443 F. Supp. 849 (S.D.N.Y. 1978) (libel); *De Sanchez* v. *Banco Central de Nicaragua*, 515 F. Supp. 900 (E.D. La. 1981) (banking); *In re Sedco, Inc.*, 543 F. Supp. 561 (oil exploration); *Perez* v. *The Bahamas*, 482 F. Supp. 1208 (D.D.C. 1980), *aff'd*, 209 U.S. App. D.C. 193, 652 F.2d 186 (1981), *cert. denied*, 454 U.S.

(footnote continued on next page)

The decision below is but another in this long line of decisions.[12]

Many sovereign acts of foreign states are likely to involve the use of commercial services and the purchase of goods in commercial transactions. The quintessential sovereign act of war involves purchases of the implements of war, and may involve the charter of ships and civil aircraft. It is absurd to argue that such sovereign acts thereby become "commercial" in nature. After all, diplomats (or intelligence agents or assassins) may use commercial airlines, but their missions of state do not thereby lose their governmental character. The decision below merely gave recognition to this fact.

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865 (1981) (police shooting at encroachers on commercial fishing waters not commercial activity); *United States* v. *County of Arlington, Virginia*, 702 F.2d 485 (4th Cir. 1983) (operating apartment building for embassy personnel not commercial activity); *MOL, Inc.* v. *Peoples Republic of Bangladesh*, 572 F. Supp. 79 (D. Ore. 1983), *aff'd*, 736 F.2d 1326 (9th Cir. 1984), *cert. denied*, —— U.S. ——, 53 U.S.L.W. 3403 (1948) (issuing export licenses permitting sales of rhesus monkeys not commercial activity); *Rios* v. *Marshall*, 530 F. Supp. 351 (S.D.N.Y. 1981) (negotiating labor contracts not commercial activity).

[12] The decision below is also in keeping with the recent Ninth Circuit decision in *Berkovitz* v. *Islamic Republic of Iran*, 735 F.2d 329 (9th Cir.), *cert. denied*, —— U.S. ——, 53 U.S.L.W. 3403 (1984). In that case, plaintiffs' decedent, an American engineer who had been working in Iran on a copper mine project, had been killed during the Iranian Revolution at the instigation of an anti-Zionist revolutionary group that had publicized the fact that he was Jewish. The Ninth Circuit rejected the argument that Iran's acts came within the "commercial activity" exception of § 1605(a)(2), stating that the FSIA "makes clear that 'commercial activity' depends on the nature of the activity, not its purpose. Berkovitz's murder, no matter what its purpose, does not have the nature of commercial activity." *Id.* at 332. Similarly, the Second Circuit held that LAN's alleged tortious participation in a political assassination is not by its nature "commercial activity."

II.

There Are No Grounds for Granting Certiorari on the Petition's Third Question Presented

Judgment Creditors also seek certiorari on the Second Circuit's application of this Court's decision in *Bancec*, 462 U.S. 611, rendered two Terms ago. Petition at (i), Question 3, and 20-26. This Court can reach this issue only if (1) it grants certiorari and reverses the Court of Appeals on the FSIA issues, and (2) in order to have a record upon which to consider the issue, it either reinstates the District Court's use of Rule 37 sanctions or reverses both courts below to find the evidentiary record sufficient.[13] Even apart from these complications, the Petition's Third Question is not appropriately reviewed by certiorari because: (a) the actual holding below does not raise a broad and important question of law, but rather represents a particular application of a general rule of law very recently enunciated by this Court, and (b) that particular application was correct.

The Third Question asks whether "[i]f a foreign state has disregarded the separate jural identity" of a commercial state enterprise, "the fiction of separate incorporation" bars execution on the assets of that state enterprise "which the state used to cause injury." Petition at (i). The decision of the Court of Appeals on this point was

[13] Because it did not accept Judgment Creditors' position either on execution immunity or on the merits, the Court of Appeals also did not reach other arguments of LAN, to wit: (1) that the judgment sought to be enforced was void for lack of jurisdiction under the FSIA, (2) that Due Process and principles of issue preclusion did not permit binding LAN by the findings and determinations in *Letelier II*, and (3) that the relief requested violated separation of powers principles.

somewhat different: "The *evidence* submitted by the judgment creditors does not reveal abuse of corporate form of the nature or degree that *Bancec* found sufficient to overcome the presumption of separate existence." 748 F.2d at 795 (emphasis added). Contrary to the suppositions in the Third Question, the Court of Appeals did not find that the evidence showed that the Republic had "disregarded the separate jural identity" of LAN, or that the Republic had "used [LAN] to cause injury." *Id.* at 794. Consequently, the Court of Appeals did not decide the Third Question as stated.

The Court of Appeals did consider whether *Bancec* approved the use of corporate disregard notions to execute on the property of a state enterprise which had not been sued and was not a judgment debtor, on the basis of allegations that it tortiously participated in the wrongful activity underlying the judgment sought to be enforced. In so doing, the Court of Appeals took pains to describe *Bancec's* holding and rationale and to compare them to Judgment Creditors' claims. *See* 748 F.2d at 793-95. *Bancec* held that the separate legal personality of a foreign state's commercial entity is normally to be respected. *Bancec*, 462 U.S. at 626-27. Only by "the application of internationally recognized equitable principles" can the entity's separate legal status be disregarded. *Id.* at 633. The *Bancec* holding itself has roots deep in such principles. *See id.* at 630-33.

The Court of Appeals conscientiously applied those principles. Its conclusion—accusations that LAN was a joint tortfeasor were not a basis for requiring LAN to pay

the Republic's judgment debt, when LAN had never been sued for the tort—is both narrow and correct.

Both the District Court below and the Petition failed to cite any American or international law authority supporting a claim that when a foreign state's secret operatives, while in the course of a secret political mission, use the commercial services of the state's commercial entity in the same manner as they could have used a private entity's commercial services, then the separate legal status of that entity has been abused or should be otherwise disregarded. As the Second Circuit correctly noted, such use of the commercial entity simply does not involve abuse of its corporate form.

In conclusion, *Bancec* having been so recently decided by this Court and the Court below having expressly and correctly applied it, there is no reason for certiorari to be granted on Judgment Creditors' Third Question Presented.[14]

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[14] As part of their *Bancec* presentation, Judgment Creditors also revert briefly to the FSIA by arguing that if LAN "is but the alter ego of Chile then the judgment is extended to the airline and all assets of a lesser instrumentality, such as an airline, are subject to execution upon a § 1605(a)(5) judgment pursuant to § 1610(b)(2) . . ." Petition at 26. Judgment Creditors did not brief this argument before the Court of Appeals; nor is it worthy of review by this Court. The purpose of § 1610(b)(2) is to provide additional means of execution on judgments against an agency or instrumentality of a foreign state, not on judgments against the foreign state itself. *See* House FSIA Report at 29-30. Judgment Creditors have not sued LAN and therefore § 1610(b)(2) is not available to them.

III.

There Are No Grounds for Granting Certiorari on the Petition's Federal Rule 37 Issue

The Fourth Question raises the issue of the Rule 37 discovery sanctions, whereby the District Court, after finding the evidence "inadequate," invoked the default of a judgment debtor in post-judgment discovery to establish the liability of a party which had not been sued. 567 F. Supp. at 1497 and 1503. The Second Circuit rejected the circularity of the District Court's approach. 748 F.2d at 795 n.2.

Judgment Creditors seek certiorari on the issue, mischaracterizing the Question Presented as whether the sanctions were properly imposed on the Republic (Petition at (i)-(ii), Question 4), and arguing that: (1) the decision below conflicts with a prior Second Circuit decision, *Trans-World Airlines, Inc.* v. *Hughes Tool Co.*, 449 F.2d 51 (2d Cir. 1971), *rev'd*, 409 U.S. 363 (1973), (2) the decision is contrary to decisions in other Circuits, and (3) the decision is otherwise "absurd." Petition at 27-28. None of these grounds has merit. In addition, the subject of sanctions against foreign governments for failure to give discovery, and especially discovery as to sovereign acts, is one that has not been considered sufficiently by lower courts to make review by this Court appropriate in the circumstances of this case.

The existence of an intra-Circuit conflict is not grounds for Supreme Court review. Eliminating such conflicts is one purpose of rehearings en banc by the Courts of Appeals, and the Second Circuit denied such a rehearing in

this case. In any event, the decision below is not in conflict with *TWA* v. *Hughes Tool.*[15]

With respect to decisions from other Circuits, the Court of Appeals specifically relied (748 F.2d at 795 n.2) on cases from the Fifth and Tenth Circuits. The two cases cited by Judgment Creditors (Petition at 28) are not to the contrary.[16]

The Second Circuit's decision also complies with Rule 37's express requirement that sanctions be imposed only "[i]f a party or an officer, director or managing agent of a party or a person designated . . . to testify on behalf of a party fails" to provide discovery. Fed. R. Civ. P. 37(d);

[15] In *TWA,* Hughes Tool was sanctioned for refusing to produce its managing agent for a deposition pursuant to court order. The Second Circuit upheld the sanctions. In that litigation, unlike the instant case, it was found, based on independent evidence, that the defaulting party, Howard Hughes, was the managing agent of the corporate defendant, that he had personally directed the activities of the defendant which were at issue, and that the defendant had knowingly assumed responsibility for the defaulting managing agent's failure to appear for a deposition. *See* 449 F.2d at 59-60 and *Trans-World Airlines, Inc.* v. *Hughes,* 32 F.R.D. 604, 606-07 (S.D.N.Y. 1963), *aff'd in part,* 332 F.2d 602 (2d Cir. 1964), *cert. dismissed,* 380 U.S. 248 (1965).

[16] *Anderson* v. *Air West, Inc.,* 542 F.2d 1090 (9th Cir. 1976) is another Howard Hughes case. The facts are unclear, but it appears that Hughes (who was also a defendant) was treated as the representative of the two corporate defendants who were also sanctioned. *Id.* at 1093. The Court relied on another case in the same Circuit approving sanctions against corporate defendants "because of failures of their representatives to appear" (*id.*), and also relied on a Second Circuit case permitting sanctions to be imposed on a party for the failure of a non-party to appear, if an alter ego relationship was demonstrated by independent evidence. *Flaks* v. *Koegel,* 504 F.2d 702 (2d Cir. 1976). *Barta* v. *Long,* 670 F.2d 907 (10th Cir. 1982) simply does not present the issue the Petition claims it does. In that case the discovery . hich all defendants defaulted on was served on both the individual defendants and the corporate defendant they controlled. 670 F.2d at 908.

accord Fed. R. Civ. P. 37(b)(2). Rule 37 sanctions can be imposed only on the disobedient party, not on co-parties who were not disobedient. 4A *Moore's Federal Practice* ¶ 37.05, at 37-106, 107 (2d ed. 1983) and cases cited therein. LAN was not the disobedient party, nor was there an independent showing that LAN is the Republic's "alter ego" or that LAN had designated the Republic to answer discovery on LAN's behalf.

In addition, as this Court has recently made clear, Rule 37 sanctions must be "just." *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee,* 456 U.S. 694, 707 (1982). The Due Process Clause also requires that Rule 37 sanctions not be imposed upon a party for a failure to provide discovery that "has been due to inability, not to willfulness, bad faith, or any fault" of the party. *Societe Internationale* v. *Rogers,* 357 U.S. 197, 212 (1958); *accord Maggio* v. *Zeitz,* 333 U.S. 56, 69 (1948) ("Every precaution should be taken that orders issue . . . only after legal grounds are shown and only when it appears that obedience is within the power of the party being coerced by the order."). Sanctioning LAN for the Republic's default obviously does not satisfy these requirements.

Consideration of the Fourth Question would also implicate the broader and more difficult issue of the kind of discovery which may be the basis for imposing sanctions against foreign sovereigns under Rule 37, in light of the requirements of United States and international law.[17] The District Court failed to consider the issue, and the Court of Appeals had no need to decide it. The discovery pro-

[17] The legislative history to the FSIA indicates that sanctions are to be imposed only when failure to give discovery is "unjustifiable." House FSIA Report at 23.

pounded by Judgment Creditors in response to the District Court's invitation and threat of sanctions (*see* 567 F. Supp. at 1497 and 1503) asked for an organization chart of a foreign intelligence service (JA 1006), details as to a mission of state allegedly carried out by that service (JA 979-88 and 1007-12), and information on communications between that service and the head of state (JA 1012-14). Until lower courts have had the opportunity to consider the subject of discovery sanctions against foreign sovereigns, and especially to consider the subject in circumstances less contrived than those presented here, it may be doubted whether review by this Court by grant of certiorari is appropriate.

Conclusion

To a significant extent, Judgment Creditors' Petition rests on a plea for a judicial remedy for wrongs suffered. They buttress this plea by a call for a strong judicial stand against international terrorism, both as a deterrent (Petition at 29) and as a means not to "undercut the forces of moderation which may exist even within extremist governments" (*id.* at 20).[18]

Their call for some form of remedy ignores the traditional remedy of diplomatic espousal, a remedy referred to by the Court of Appeals (748 F.2d at 799 n.4) and which Judgment Creditors evidently have decided not to pursue.

Their call for a judicial remedy ignores the fact that the party against which they seek the remedy is a party they chose not to sue, either as an alleged alter ego or as a joint tortfeasor, even though they intended, before judgment

[18] *Compare* U.S. Const. Art. I, § 8 and Art. II, §§ 1-2.

was entered in the Letelier Action, to proceed against that party's assets on the basis of allegations that it was involved in the tortious activity for which they were there bringing suit.[19] The decision of Judgment Creditors not to bring LAN into the Letelier Action, where no defendant was present, may have been made for tactical reasons. But whatever the reason, there is no important question of public order involved in a request to relieve Judgment Creditors of the consequences of their own decision never to sue the party against which they were intending to execute.

In conclusion, for all of the reasons stated herein it is respectfully requested that Judgment Creditors' Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit be denied.

Respectfully submitted,

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May 6, 1985

[19] Prior to entry of judgment in *Letelier II*, Judgment Creditors made an ex parte submission to the District Court making essentially the same accusations as to LAN as were made in the supplementary proceeding below, and explaining that they wished the District Court to make findings on the accusations (not served on LAN or the Republic) "to preserve plaintiffs' rights concerning collection of a judgment herein." JA 435-37.

APPENDIX

Opinion of United States District Court District of Columbia

UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

Civ. A. No. 78-1477

Nov. 5, 1980

ISABEL MOREL DE LETELIER et al.,

Plaintiffs,

v.

THE REPUBLIC OF CHILE et al.,

Defendants.

Survivors and personal representatives of former Chilean ambassador and passenger in his car brought action against the Republic of Chile and various Chilean employees to recover for bombing deaths of victims occurring as they drove to work together. The District Court, Joyce Hens Green, J., held that: (1) plaintiffs produced satisfactory evidence to entitle them to judgment by default for defendants' acts of assault and battery, negligent transportation and detination [sic] of explosives, conspiracy to deprive victims of their constitutional rights, tortious actions in violation of international law, and tortious assault upon an internationally protected person, and (2) plaintiffs were entitled to damages for compensation for pain and suffer-

ing, wrongful death damages, punitive damages, and attorney fees.

Judgment for plaintiffs.

Michael E. Tigar, Samuel J. Buffone, Lynn Bernabei, Tigar & Buffone, P. C., Washington, D. C., for plaintiffs.

William J. Garber, Washington, D. C., for Ignacio Novo Sampol.

Barry W. Levine, Washington, D. C., for Michael Townley for limited purpose of issue of contempt.

MEMORANDUM OPINION

Joyce Hens Green, District Judge.

This action is before the Court for a final determination relevant to the attempt of plaintiffs Isabel, Christian, Jose, Francisco, and Juan Pablo Letelier, and Michael Maggio, respectively the widow, sons, and personal reprepresentative of Orlando Letelier, and Michael Moffitt and Murray and Hilda Karpen, respectively the widower-personal representative and the parents of Ronni Karpen Moffitt, to obtain judgments by default against defendants Republic of Chile, Juan Manuel Contreras Sepulveda, Pedro Espinoza Bravo, Armando Fernandez Larios, Michael Vernon Townley, Alvin Ross Diaz, Guillermo Novo Sampol, and Ignacio Novo Sampol, for their alleged culpability for the bombing deaths of former Chilean ambassador Letelier and Ronni Moffitt in September 1976 in Washington, D.C. After careful consideration of the entire record of this case, including the testimony and documentary evidence presented at the June 20, 1980 hearing regarding several of the pending applications for judgments by default, it is apparent plaintiffs have established

their right to relief as against all but one of these defendants and thus are entitled to judgments by default in the amounts hereinafter set forth.

Plaintiffs, either citizens of the states of Maryland or New Jersey, or of the District of Columbia, or of the Republic of Chile, brought this suit asserting various tortious causes of action[1] and seeking recompense, pursuant to those statutory enactments governing the survival of actions, D.C.Code § 12–101 (Supp. VII 1980), and wrongful death, *id.* § 16-2701 (1973), from those they alleged were involved in the deaths of Orlando Letelier and Ronni Moffitt, both of whom died as a result of the detonation of an explosive device under the driver's seat of Orlando Letelier's automobile as it rounded Sheridan Circle, N.W., in the District of Columbia on September 21, 1976. The named defendants to the action are either a foreign state, or citizens of a foreign state, or citizens of a state other than the states of Maryland or New Jersey or of the District of Columbia.

Filed on August 23, 1978, the first amended complaint in this action was served by Deputy United States Marshals upon Alvin Ross Diaz (Ross), Guillermo Novo Sampol (Guillermo Novo), and Ignacio Novo Sampol (Ignacio Novo) on August 23, 1978, and on defendant Michael Vernon Townley two days later. Service was attempted upon defendants Juan Manuel Contreras Sepulveda (Con-

1. In this complaint plaintiffs have asserted the following causes of action: 1) conspiracy to deprive Orlando Letelier and Ronni Moffitt of their constitutional rights in violation of 42 U.S.C. § 1985 (1976); 2) assault and battery; 3) negligent transportation and detonation of explosives; 4) tortious activities in violation of the law of nations resulting in death to Orlando Letelier and Ronni Moffitt; and 5) tortious assault upon Orlando Letelier, an internationally protected person pursuant to 18 U.S.C. § 1116 (1976), that was the proximate cause of his death and the death of Ronni Moffitt.

treras), Pedro Espinoza Bravo (Espinoza), and Armando Fernandez Larios (Fernandez) in Chile by registered mail, return receipt requested, pursuant to Federal Rule of Civil Procedure 4(i)(1)(D). On September 7, 1978, the return receipts were filed with the Court upon which it was indicated that copies of the first amended complaint were received on behalf of defendants Contreras, Espinoza, and Fernandez on August 29, 1978. Upon their failure to answer, defaults were taken against defendants Townley, Ross, and Ignacio Novo on September 20, 1978, while a default was entered against defendant Guillermo Novo on October 24, 1978.

As to defendant Republic of Chile, it was served with the first amended complaint on November 17, 1978, pursuant to the procedures set forth at 28 U.S.C. § 1608(a)(4). Upon its failure to answer, a default was entered against the Chilean Republic by the Honorable John H. Pratt on May 2, 1979. Because questions were raised about the subject matter jurisdiction of the Court to entertain this suit against the Republic of Chile under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1601—1610 [sic] (1976), after receiving a memorandum on that subject from plaintiffs on March 11, 1980, a memorandum opinion was filed in which it was held that such jurisdiction did indeed lie. *Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980).

In June 1980, a hearing was held at which plaintiffs were afforded an opportunity to satisfy the Court that judgments by default should be granted in their favor and against the Republic of Chile, pursuant to 28 U.S.C. § 1608(e) (1976), and individual defendants Townley, Ross, Guillermo Novo, and Ignacio Novo, pursuant to Federal

Rule of Civil Procedure 55(b)(2). Subsequently, on September 22, 1980, service of the first amended complaint was again obtained upon defendants Contreras and Fernandez in Chile, this time by letters rogatory in accord with Rule 4(i)(1)(B). Defaults then were taken against defendants Contreras, Espinoza, and Fernandez on October 23, 1980, making this action ripe for disposition as to all defendants.[2]

In seeking to establish their claims to relief relating to the tragic deaths of Orlando Letelier and Ronni Moffitt, the evidence presented by plaintiffs which details the bombing incident is, in the main, derived from the testimony of defendant Michael Vernon Townley under oath at the criminal trial of defendants Ross, Ignacio Novo, and Guillermo Novo in January 1979.[3] As related by Townley,

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2. Also named as defendants in the first amended complaint to this action were the Centro Nacional de Informaciones (CNI) formerly Direccion de Intelligencia Nacionale (DINA)), Virgilio Paz Romero, Jose Dionisio Suarez Esquivel, and John Does One through Ten. For various reasons and with plaintiffs' acquiescence all of these defendants have been dismissed from this action, without prejudice.

3. Following a five-week trial by jury in early 1979, defendants Ross and Guillermo Novo were convicted of various charges relating to the deaths of Orlando Letelier and Ronni Moffitt, including first degree murber, D.C. Code § 22-2401 (1973), murder of a foreign official, 18 U.S.C. §§ 1111, 1116 (1976), and conspiracy to murder a foreign official, *id.* § 1117, while Ignacio Novo was convicted of making false declarations to the grand jury, *id.* § 1623, and misprison [sic] of a felony, *id.* § 4. All three were sentenced to substantial prison terms. Recently, however, the convictions of all three defendants were overturned by the United States Court of Appeals for the District of Columbia Circuit. *United States* v. *Sampol*, 636 F.2d 621 (D.C. Cir. 1980). The convictions of Ross and Guillermo Novo were reversed because of the introduction of the testimony of government informants who were inmates in the same cell-blocks with Guillermo Novo and Ross while they were imprisoned awaiting trial, *id.* at 630 642; Ignacio Novo's conviction was reversed because of the failure

(footnote continued on next page)

an American citizen and a long-time Chilean resident, he first became involved in the events that culminated in the Letelier and Moffitt killings sometime in late June or early July 1976. At that time he was contacted by defendant Armando Fernandez Larios, then a lieutenant in the Chilean Army and an operative of the Chilean intelligence service, the Direccion de Intelligencia Nacionale (DINA) (now known as the Centro Nacionale de Informaciones (CNI)), to arrange a meeting between Townley, then a civilian contract employee of DINA, and defendant Pedro Espinoza Bravo, then a lieutenant colonel in the Chilean Army and Director of Operations of DINA. At the meeting, Colonel Espinoza asked Townley whether he would be available for a special DINA operation outside Chile in the near future. Townley indicated that while he was reluctant to leave the country because of his wife's health,

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of the trial court to grant him a separate trial on the charges against him, *id.* at 642 651.

As evidence in support of their applications for default judgments, the plaintiffs introduced approximately 160 exhibits, many of which were copies of exhibits introduced at the trial of the Novos and Ross, but none of these were related to the matters cited by the Court of Appeals as compelling the reversal of the three convictions. Also introduced were copies of the sworn testimony of defendant Michael Vernon Townley given at the criminal trial. Although defendant Townley currently is serving a criminal sentence for his involvement in the Letelier and Moffitt killings at an undisclosed location under the aegis of the United States Marshals' Witness Protection Program, because of the clear and present danger to Mr. Townley and to other persons that would have been precipitated by bringing him before the Court, he has been considered unavailable. Consequently his sworn testimony during the criminal proceedings instituted against the Novos and Ross, which was not in any way questioned by the Court of Appeals or involved as a basis for the reversal of the convictions, has been considered in determining the propriety of the entry of the judgments by default in this case. Fed.R.Evid. 804(a)(5). The testimony of the government informers that the Court of Appeals found to have been improperly admitted at the criminal trial has not been considered by this Court.

he would undertake such a mission if ordered to do so. At another meeting several weeks later, Espinoza informed Townley that the mission would involve travel to the United States for the purpose of assassinating Orlando Letelier. Entry into the United States, according to Espinoza, was to be accomplished with Paraguayan documents and, to the extent necessary, Fernandez and Townley were to use members of the anti-Castro Cuban exile group, the Cuban Nationalist Movement (CNM), to accomplish the murder.

In July 1976, Fernandez and Townley went to Paraguay, via Argentina, and, with the help of Paraguayan authorities, obtained Paraguayan passports under assumed names which, in turn, they used to obtain visas to the United States. Because of the apparent uneasiness of DINA officials in Chile over the nearly two weeks it took to obtain the passports and visas, the trip of Fernandez and Townley to the United States using those documents was cancelled and they were ordered to return to Chile, which they did.

In August 1976, Espinoza again contacted Townley to inform him that the Letelier mission was still scheduled and that Fernandez was already in the United States surveilling Letelier to record his movements and daily patterns. Townley was instructed, as he had been in the earlier meetings, to make the killing appear accidental or a suicide if possible, but that other means, including an explosive or a shooting, could be utilized to eliminate Letelier. Townley also was told that he was to be out of the United States before the assassination took place.

Townley departed Santiago, Chile, on September 8, 1976, and arrived at New York's John F. Kennedy Inter-

national Airport on September 9, traveling under the assumed name of Hans Peterson Silva. Uncontradicted testimony demonstrated that facilities and personnel of LAN Chile Airlines, a foreign air carrier owned and operated by the government of Chile, were used by Townley in connection with the preparation and carrying out of the assassination of Orlando Letelier and Ronni Moffitt. At Kennedy Airport he met Fernandez and was given a sketch of Letelier's residence and place of employment as well as written information describing the Leteliers' automobiles. Fernandez also gave Townley a verbal briefing on Letelier's daily movements. The two DINA agents then parted and Fernandez returned to Chile.

From Kennedy Airport Townley drove a rental car into New Jersey and checked into a hotel under the name of Hans Peterson. He made contact by telephone with CNM member Virgilio Paz Romero and scheduled a supper meeting. At the dinner, Townley made further arrangements to meet with defendant Guillermo Novo Sampol, a CNM leader. On September 10, 1976, he met for lunch with Guillermo Novo and Jose Dionisio Suarez Esquivel. At this meeting, he outlined his DINA mission to assassinate Letelier and sought CNM's help. Guillermo Novo declined to commit CNM at that time. Subsequently, however, after another gathering at which the assassination plan was discussed in the presence of several individuals identified as directors of CNM, including Guillermo Novo, Suarez, and defendant Alvin Ross Diaz, Guillermo Novo and Suarez informed Townley that it had been decided that CNM would assist DINA in murdering Letelier. It was agreed that Paz and Townley would proceed to Washington, D.C., to conduct corroborative surveillance

and that Suarez would join them several days later to assist in the assassination. It was also decided that the attempt would be made by installing a bomb under Letelier's automobile and detonating it with a remote control device.

On September 15, 1976, Townley went with Paz to the Union City, New Jersey headquarters of CNM where they received from Guillermo Novo and Suarez a paging device modified for use as a remote control detonator and a shopping bag containing three kilograms of dynamite and one-half pound of plastic explosive. Paz and Townley then proceeded by car to Washington, arriving in the early morning hours of Thursday, September 16, 1976. Once in Washington, they first drove to the vicinity of Orlando Letelier's home to check that general area. They then registered in a motel in northwest Washington. The remainder of Thursday and all day on Friday, September 17, was [sic] spent verifying and supplementing the information supplied by Fernandez concerning Letelier's movements and habits; at one point they even trailed Letelier by car from his home to his office at the Institute for Policy Studies. On Friday they also went to a department store in upper northwest Washington and purchased two aluminum baking pans and several rolls of electrical tape to be used in building a bomb and a pair of rubber gloves to avoid leaving fingerprints on their explosive handiwork. Suarez arrived from New Jersey on the morning of Saturday, September 18, 1976, to aid in the preparations, and after Paz and Townley moved to a different motel in northeast Washington across from Suarez's motel, the three made a shopping trip to an electronics store in downtown Washington where they purchased a

battery pack and a set of tools to be used for constructing the bomb.

On the evening of Saturday, September 18, 1976, Townley built the bomb intended for the assassination attempt in the motel room he shared with Paz. Paz, Suarez, and Townley then drove to the Letelier house to place the bomb on Orlando Letelier's car. Although it was planned that Paz and Suarez were to take responsibility for detonation of the device on Monday, September 20, they insisted that Townley, as a DINA agent, attach it. After several false starts, Townley succeeded in planting the bomb beneath Letelier's car, which was parked in the driveway of the Letelier home.

On the morning of Sunday, September 19, 1976, Townley flew from Washington to Newark, New Jersey, and was met by defendant Ross. Over breakfast, Townley gave Ross the full details of his activities in Washington. Ross then drove Townley to Guillermo Novo's residence where Townley described for Novo his actions in Washington.

Later that same day, Townley went to Kennedy Airport to catch a flight to Miami, Florida. While there, he attempted to "fix" the records showing the entry of Hans Peterson Silva into the United States. This was done by surreptitiously mixing the Immigration and Naturalization Service's Form I-94, issued to Townley under the name of Silva upon his arrival in the United States, with a pile of I-94's collected from passengers departing for Spain on a Spanish airliner. Because his past experience indicated that the I-94's collected at ticket counters were turned over to immigration officials by airline personnel without any effort to check them against the passengers listed in the flight manifest, Townley hoped in this way to insure that

immigration records would show Silva left the country prior to any attempt to assassinate Letelier. Townley then took a flight from Kennedy Airport to Miami, arriving either in the late evening of September 19 or in the early morning hours of Monday, September 20, 1976.

On Monday, Townley went to visit his parents who lived in the Miami area and stayed until Tuesday, September 21, 1976. Having received no word of any assassination attempt, at approximately 7:00 a. m. on Tuesday morning Townley contacted Paz by telephone at his New Jersey residence for the purpose of ascertaining what had happened in Washington. Paz, however, was very curt, chiding Townley for using the telephone for sensitive conversations before immediately hanging up. Later that day, Townley contacted defendant Ignacio Novo Sampol, the brother of Guillermo Novo and a CNM member who lived in Miami, to arrange a meeting. Ignacio Novo advised Townley to listen to the radio because something big had happened in Washington. Later that day, at a meeting with Ignacio Novo, Townley described in detail his activities with Paz and Suarez in Washington.

Townley, traveling under the name Kenneth Enyart, returned to Chile on a Chilean airline flight that left Miami on the evening of Wednesday, September 22, 1976.

Within a few days after his return to Chile, Townley reported to Colonel Espinoza and briefed him on the results of the Letelier mission. Also shortly after the Letelier mission, Townley made a telephone call to Paz in the United States, who explained to Townley that the bomb had not been detonated on Monday, September 20, 1976, because of a malfunction and, as a consequence, CNM had removed the bomb from Letelier's car, fixed it, and then reinstalled it.

In early 1978, developments in the investigation of the Letelier assassination in the United States prompted Guillermo Novo, Virgilio Paz, and Alvin Ross to contact defendant Townley by telephone at different times to request a loan of $25,000 in order to relocate those CNM members they felt were under goverment scrutiny. Townley relayed this request to defendant General Manuel Contreras Sepulveda, who was director of DINA at the time of the assassination. Contreras indicated to Townley, however, that because he was no longer director of DINA, he did not have access to funds. Contreras and Townley also met in March 1978 to discuss covering up the trips of Townley and Fernandez to Paraguay to obtain passports and visas and to the United States to plan and execute the Letelier assassination. Contreras first suggested that Townley flee Chile to avoid questioning, but when this request was rejected, he suggested that Townley and Fernandez admit that they went to Paraguay on a national security mission, the nature of which they would refuse to disclose, and that neither had gone to the United States. Townley, Fernandez, and Contreras then met together and it was agreed, as to the Paraguay trip, that they would tell the truth about that trip, with the exception of its purpose as part of any plan to kill Letelier.

Finally, Townley testified that while he received his orders for the mission from Colonel Espinoza, ultimately only General Contreras, as director of DINA, could have authorized the undertaking of the mission outside of Chile and the issuance of the passport in the name of Hans Peterson Silva used by Townley to gain admittance to the United States.

Further detailing the events surrounding the Letelier assassination and corroborating Townley's sworn testi-

mony were a number of witnesses and various exhibits offered by plaintiffs.

According to the testimony of plaintiff Isabel Letelier, following the election of Salvador Allende as president of Chile in 1970, Orlando Letelier served variously as Ambassador of the Republic of Chile in the United States, Minister of Foreign Relations, Minister of Interior, and finally Minister of Defense. When the military junta headed by General Augusto Pinochet came to power in September 1973, Letelier was imprisoned until approximately February of 1974. At that time, he was expelled from Chile and after a stay in Venezuela made his way to the United States in January 1975. While in the United States, he served as Director of the Transnational Program at the Institute for Policy Studies in Washington, D.C. During 1975 and 1976 up until the time of his death, he not only worked at the Institute, but also taught at a local university and engaged in various political activities, which included speaking and writing in opposition to the Pinochet government.

As to the events of the day of September 21, 1976, plaintiff Michael Moffitt testified that because of trouble with their car, he and Ronni Moffitt were riding with Orlando Letelier that morning to the Institute where they were all employed. Orlando Letelier was driving, while Ronni Moffitt was in the front passenger seat and Michael Moffitt was in the rear behind his wife. As they rounded Sheridan Circle, an explosion erupted under the car, lifting it off the ground. When the car came to a halt, Michael Moffitt was able to escape from the rear end of the car by crawling out a back window. He saw his wife stumbling away from the car and assuming that she was all

right, went to assist Letelier. He found Letelier still in the driver's seat, and despite the fact that much of his lower torso was blown away, Letelier's head was rolling back and forth, his eyes were moving slightly, and he attempted to mutter several things, which were unintelligible. Michael Moffitt tried to remove Letelier from the car but was unable to do so. He then noticed that his wife had disappeared from view and as the police began to arrive he left Letelier and went across the street where he found Ronni Moffitt lying on the ground, being attended to by a doctor who happened to be driving by at the time of the explosion. Ronni Moffitt was bleeding heavily from her mouth.

Both Ronni Moffitt and Orlando Letelier were taken to the hospital shortly thereafter. While Michael Moffitt estimated that the bomb was detonated at approximately 9:30 a.m., the reports of the Medical Examiner's office set the time of death of Orlando Letelier at 9:50 a.m. and the time of death of Ronni Moffitt at 10:37 a.m. The cause of death for both was listed as explosion-incurred injuries.

Finally, appearing on behalf of plaintiffs as an expert on Chilean law was Professor Eugenio Velasco, a former director of the School of Law at the National University of Chile who is now teaching at several American law schools following his exile from Chile in 1976. Testifying about the content and meaning of the statutory provisions that established DINA, Decree Law No. 521 of June 18, 1974, and Decree Law No. 527 of June 26, 1974, Professor Velasco declared that DINA, as characterized by article 1 of Decree Law No. 521, was a military organism that depended directly on the ruling military junta headed by President Augusto Pinochet. The relationship of DINA

to the junta was more fully explained, according to Professor Velasco, by Decree Law No. 527, which placed DINA directly under President Pinochet by reason of its provisions granting Pinochet all executive power. Further, as it relates to the role of the Director General of DINA, who, until its dissolution in 1977, was Manuel Contreras Sepulveda, Professor Velasco found that Decree Law No. 521 placed upon the Director General responsibility for and direct control of the most important functions of DINA. As to the status of DINA's successor, the Centro Nacionale de Informaciones, by Decree Law No. 1878 of August 12, 1977, it was established as the legal successor to DINA and took over all of DINA's assets, liabilities, responsibilities, and rights. Finally, Professor Velasco testified that on the basis of the statutory attributes given DINA and the director general, only General Contreras could have ordered the assassination of Orlando Letelier.

From the various filings of the plaintiffs and the totality of the evidence presented to the Court, the following legal conclusions are in order:

1. The Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1330, 1331, 1332(a)(3), 1343(1)-(2), 1350 and the doctrines of pendent and ancillary jurisdiction.

2. Pursuant to the dictates of 28 U.S.C. § 1608(e), plaintiffs have produced satisfactory evidence to establish that on or about September 21, 1976, employees of the Republic of Chile, acting within the scope of their employment and at the direction of Chilean officials who were acting within the scope of their office, committed tortious acts of assault and battery and negligent transportation and detonation of explosives that were the proximate cause of the deaths of

Orlando Letelier and Ronni Moffitt. Accordingly, a judgment by default as to these claims will be entered in favor of plaintiffs and against the Republic of Chile.

3. The issuance of a judgment by default against defendants Juan Manuel Contreras Sepulveda, Pedro Espinoza Bravo, Armando Fernandez Larios, Michael Vernon Townley, Alvin Ross Diaz, and Guillermo Novo Sampol is proper as to plaintiffs' claim of conspiracy to deprive Orlando Letelier and Ronni Moffitt of their constitutional rights in violation of 42 U.S.C. § 1985, assault and battery, negligent transportation and detonation of explosives, tortious actions in violation of international law, and tortious assault upon Orlando Letelier, an internationally protected person pursuant to 18 U.S.C. § 1116, which was the proximate cause of the deaths of Letelier and Ronnie Moffitt.[4]

Plaintiffs have established their rights to relief by evidence satisfactory to the Court.

Judgments by default being proper, damages will be assessed against the defendants. Suit was instituted in this instance under both the District of Columbia statute governing survival of actions, D.C. Code § 12-101 (Supp. VII 1980), and the legislative enactment allowing wrongful death actions, *id.* § 16-2701 (1973). On the basis of the evidence presented on June 20, 1980, as to the pain and suffering of Orlando Letelier and Ronni Moffitt as well as their estimated life values, that is, the loss of support resulting

4. Although plaintiffs have sought a default judgment against defendant Ignacio Novo Sampol as well, it is apparent from the evidence presented to the Court that his knowledge of and involvement in the murders occurred only after they had been accomplished, making any finding of civil liability inappropriate as it relates to Ignacio Novo. Accordingly, the Court will vacate the default entered against that defendant and dismiss him from this action.

from their deaths, the following allocation of damages is made:[5]

I. With respect to Orlando Letelier: a) under the survival statute, D.C.Code § 12-101, and 28 U.S.C. § 1606, 1) judgment will be entered in favor of plaintiffs Isabel, Christian, Jose, Francisco, and Juan Pablo Letelier and against defendants Republic of Chile, Juan Manuel Contreras Sepulveda, Pedro Espinoza Bravo, Armando Fernandez Larios, Michael Vernon Townley, Alvin Ross Diaz, and Guillermo Novo Sampol, jointly and severally, in the amount of $30,000 to compensate for pain and suffering; and 2) judgment will be entered in favor of plaintiffs Isabel, Christian, Jose, Francisco, and Juan Pablo Letelier and against defendants Juan Manuel Contreras Sepulveda, Pedro Espinoza Bravo, Armando Fernandez Larios, Michael Vernon Townley, Alvin Ross Diaz, and Guillermo Novo Sampol, jointly and severally, in the amount of $1,000,000 as an award of punitive damages; and b) under the wrongful death statute, D.C.Code § 16-2701 and 28 U.S.C. § 1606, judgment will be entered in favor of plaintiff Michael Maggio, as the personal representative of Orlando Letelier, and against defendants Republic of Chile, Juan Manuel Contreras Sepulveda, Pedro Espinoza Bravo, Armando Fernandez Larios, Michael Vernon Townley, Alvin

5. Although the June 20, 1980, hearing at which evidence relevant to damages was presented by plaintiffs was before the entry of defaults against defendants Juan Manuel Contreras Sepulveda, Pedro Espinoza Bravo, and Armando Fernandez Larios, they have been sued in this action as joint tortfeasors along with the other parties against whom defaults were pending on June 20, 1980. Plaintiffs have requested that the evidence adduced at that June hearing be applied to the question of damages against Contreras, Espinoza, and Fernandez and will be so considered without holding a separate, duplicative hearing. *See* Order of October 23, 1980.

Ross Diaz, and Guillermo Novo Sampol, jointly and severally, in the amount of $1,526,479.

II. With respect to Ronni Karpen Moffitt: a) under the survival statute, D.C.Code § 12-101 and 28 U.S.C. § 1606, 1) the judgment will be entered in favor of plaintiffs Michael Moffitt and Hilda and Murray Karpen and against defendants the Republic of Chile, Juan Manuel Contreras Sepulveda, Pedro Espinoza Bravo, Armando Fernandez Larios, Michael Vernon Townley, Alvin Ross Diaz, and Guillermo Novo Sampol, jointly and severally, in the amount of $80,000 to compensate for pain and suffering; and 2) judgment will be entered in favor of plaintiffs Michael Moffitt and Hilda and Murray Karpen and against Juan Manuel Contreras Sepulveda, Pedro Espinoza Bravo, Armando Fernandez Larios, Michael Vernon Townley, Alvin Ross Diaz, and Guillermo Novo Sampol, jointly and severally, in the amount of $1,000,000 as an award of punitive damages; and b) under the wrongful death statute, D.C.Code § 16-2701 and 28 U.S.C. § 1606, judgment is entered in favor of plaintiff Michael Moffitt, as the personal representative of Ronni Karpen Moffitt, and against defendants Republic of Chile, Juan Manuel Contreras Sepulveda, Pedro Espinoza Bravo, Armando Fernandez Larios, Michael Vernon Townley, Alvin Ross Diaz, and Guillermo Novo Sampol, jointly and severally, in the amount of $916,096.

Unquestionably, there has been grave loss to Michael Moffitt, the widower of Ronni Moffitt, who has also sued the defendants in his individual capacity. Not only was he the other passenger in the vehicle in which the assassinations occurred, but his testimony vividly described the ordeal to his own physical and emotional person as a proximate

result of the events of September 21, 1976, including subsequent psychiatric therapy. Nonetheless, no judgment for damages can be entered in his favor other than as to pain and suffering since the record is barren as to any specific information concerning the psychiatric therapy other than vague references thereto. The expenses accordingly incurred and expected to incur in the future, if at all, are only speculative. As to his pain and suffering, proximately resulting from the defendants' acts, judgment will be entered in favor of the plaintiff, Michael Moffitt, individually and against defendants Republic of Chile, Juan Manuel Contreras Sepulveda, Pedro Espinoza Bravo, Armando Fernandez Larios, Michael Vernon Townley, Alvin Ross Diaz, and Guillermo Novo Sampol, jointly and severally, in the amount of $400,000.

Counsel for plaintiffs have moved the Court for an award of attorneys' fees and expenses noting by affidavit the hourly investments and rates of the five attorneys who have prepared, filed and litigated this action, as well as the out-of-pocket expenses actually incurred in connection with this cause for which reimbursement is sought.

The lawsuit has involved intricate proceedings, reliance on a relatively new statute devoid of interpretation relevant to the instant matter, proposed default against a foreign nation, and studied application to international document exchange. The unique and complex investigation/research, conducted necessarily in an atmosphere charged with special sensitivity to diplomatic mores, unceasingly intensified the tragic circumstances compelling this litigation.

The 1,417 hours were logged primarily by associates of the firm with varying degrees of experience and the firm itself has, in concert with *Copeland v. Marshall*, No. 77-1351

(D.C.Cir. Sept. 2, 1980) (en banc) discounted their hours by twenty percent to offset "learning" experience and to reflect, accordingly, 1,233.75 hours invested in these proceedings.

The zealous application of counsel who were unswervingly committed to their compassionate pursuit on behalf of the plaintiffs must be commended highly. They exhibited substantial legal skills in this novel litigation, slicing through obfuscation to achieve a conclusion of substantial benefit to their clients. An award of compensable and reasonable counsel fees in such a situation is not only appropriate but mandated. It is of interest to note that plaintiffs' counsel who devote a substantial amount of their time to *pro bono publico* matters, will assign any judgment for attorneys' fees to the Letelier-Moffitt Human Rights Fund, a non-profit organization.

Accordingly, pursuant to 42 U.S.C. § 1988, defendants Juan Manuel Contreras Sepulveda, Pedro Espinoza Bravo, Armando Fernandez Larios, Michael Vernon Townley, Alvin Ross Diaz, and Guillermo Novo Sampol are held liable jointly and severally for the fees and expenses of plaintiffs' counsel in the amounts of $100,000.00 for counsel fees and $10,279.97 for reimbursement of expenses.